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In the Supreme Court
OF THE
United States

OTOBER TERM, 1947

No.

FONG HAW TAN, *Petitioner,*

vs.

ARTHUR J. PHELAN, Acting District Director, Immigration and Naturalization Service, Port of San Francisco, California, *Respondent.*

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Fong Haw Tan respectfully shows:

OPINION BELOW.

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals for the Ninth Circuit is incorporated in the transcript of record (pp. 24 to 29).

JURISDICTION.

The judgment sought to be reviewed was entered on the 25th day of June, 1947 (Tr. p. 30). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF FACTS.

The petitioner is a native of China. On April 13, 1910, he arrived in the United States at the Port of San Francisco, on the SS "Korea" and was admitted for permanent residence. He resided continuously from that date of entry until the present time. On June 11, 1925, an indictment was returned against him, charging him with the murder of two Chinese on May 22, 1925, in Fresno, California. On July 21, 1925, he was convicted of both counts in said indictment and the jury in its findings recommended that the punishment be life imprisonment on each count. The Court so sentenced the petitioner. The petitioner was taken into custody by the United States Immigration and Naturalization Service under a warrant of deportation dated November 14, 1941, issued in pursuance of the provisions of Section

155(a), Title 8, U.S.C.A. After a hearing, the United States Immigration Inspector found that the petitioner was subject to deportation in that the petitioner has been sentenced twice in the circumstances required by the statute for deportation. On review, the Board of Immigration Appeals sustained the action of the said immigration inspector and ordered the issuance of the warrant for the petitioner's deportation. His petition before the United States District Court for the Northern District of California, Southern Division, was denied and, upon appeal to the Circuit Court of Appeals for the Ninth Circuit, the order dismissing the petition was affirmed (Tr. p. 30).

QUESTION PRESENTED.

Whether or not an alien, who shot and killed two persons at the same time and under the same impulse and was thereupon convicted on two counts in a single indictment and sentenced to a term of life imprisonment on each count, has been "sentenced more than once" within the contemplation, intent and purpose of Section 155(a) of Title 8, U.S.C.A.

STATUTE INVOLVED.

Section 155(a), Title 8, U.S.C.A., provides, as follows:

> "* * * except as hereinafter provided, any alien, who, after May 1, 1917, is sentenced to imprisonment for a term of one year or more because of

conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude committed at any time after entry * * * shall, upon the warrant of the Attorney General, be taken into custody and deported * * *."

REASONS RELIED ON FOR THE GRANTING OF THE PETITION.

(a) Conflict of decisions.

Because the question presented involves a conflict of decisions in the various Circuit Courts of Appeals, it is earnestly submitted that the petition should be granted.

Dated, San Francisco, California,
September 22, 1947.

LAMBERT O'DONNELL,
WILLIAM J. CHOW,
THOMAS C. LYNCH,
Counsel for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1947

No.

FONG HAW TAN,
Petitioner,

vs.

ARTHUR J. PHELAN, Acting District Director, Immigration and Naturalization Service, Port of San Francisco, California,
Respondent.

BRIEF IN SUPPORT OF PETITION.

JURISDICTION.

The statutory provision sustaining the jurisdiction of this Court to allow the writ of certiorari is contained in Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF PROCEEDINGS.

(a) A petition for a writ of habeas corpus was filed in the District Court for the Northern District of California on May 10, 1946 (Tr. pp. 2 to 6).

(b) The judgment and order of the District Court denying the petition for a writ of habeas corpus was filed and entered on August 12, 1946 (Tr. p. 8).

(c) The opinion of the Circuit Court of Appeals for the Ninth Circuit was rendered and filed on June 25, 1947 (Tr. p. 24).

(d) The judgment of the Circuit Court of Appeals for the Ninth Circuit was entered and filed on June 25, 1947 (Tr. p. 30).

(e) No petition for rehearing was filed.

The judgment of the Circuit Court of Appeals in habeas corpus proceedings is a final judgment.

STATEMENT OF THE CASE.

The proceeding is in habeas corpus and was commenced for the purpose of obtaining the discharge of the petitioner from the custody of the respondent, who, upon orders contained in a warrant for the petitioner's deportation dated November 14, 1941, was holding the petitioner for deportation to China.

The petitioner had been taken into custody by reason of the fact that he had been charged in Fresno, California, in an indictment with two separate acts of murder, in the first count with the murder of

Lai Quan, and in the second with the murder of Ong Kim. After his conviction, and on July 21, 1925, he was given separate sentences of life imprisonment on each of the two counts. The appellant was taken into custody by appropriate officials of the United States Immigration and Naturalization Service under warrant for his deportation dated November 14, 1941, issued in pursuance of the provisions of Section 155(a), Title 8, U.S.C.A. In accordance with Rule 18 of the Immigration Rules of July 1, 1925, he was given a hearing on September 12, 1925, and also on January 18, 1926, before a United States Immigrant Inspector. As a result of these hearings the officer found that appellant was subject to deportation under Section 155(a), Title 8, U.S.C.A., reading as follows:

> "* * * except as hereinafter provided, any alien, who, after May 1, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude committed at any time after entry * * * shall, upon the warrant of the Attorney General, be taken into custody and deported * * *."
>
> * * * * * * *
>
> "The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deporta-

tion be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this chapter. * * *"

On review by the Board of Immigration Appeals, his action was sustained and an order entered directing the issuance of the warrant for his deportation, and under which warrant he has been held.

ARGUMENT.

JUDICIAL INTERPRETATION.

There is plain conflict in the various circuits as to the proper interpretation of the phrase "sentenced more than once". The Circuit Courts of Appeals for the First, Second, Fourth, Fifth, and Ninth Circuits have all endeavored to construe the quoted portion of the statute; and in some instances, even in the same circuit, the decisions appear to be in some conflict. In what might be called the first leading case, *Johnson v. U. S. ex rel. Pepe,* 28 F. (2d) 810 (C.C.A. 2, 1928), the Court held that the phrase meant or refers to the number of separate crimes for which sentences are imposed; and while it expressly affirmed this prior holding in the later case of *U. S. ex rel. Mignozzi v. Day,* 51 F. (2d) 1019 (1931), that Court further held that "it is the duplication of

penalties which counts". So that Mignozzi was held not to have been sentenced more than once for deportation purposes even though there were two indictments (one indictment in one count, the other indictment containing two counts), and even though, procedurally, the general sentence to a term of seven years is actually a separate sentence upon each indictment and each count thereof. Further, the same Court did not follow its own line of distinction in affirming the order of the District Court, sustaining a writ of habeas corpus, in *U. S. ex rel. Turco v. Commissioner of Immigration,* 58 F. (2d) 1087, where Turco had been sentenced to a term of two years' imprisonment on each one of seven counts of an indictment for a like number of separate offenses of possession of, or passing, counterfeit money, the sentences being made to run *consecutively,* although the Court purported to take this action in a *per curiam* decision on the authority of *Mignozzi v. Day,* supra.

In 1931, the Ninth Circuit Court of Appeals, in the case of *Nishimoto v. Nagle,* 44 F. (2d) 304, in the most broad interpretation of the phrase "sentenced more than once" yet rendered by any Court, held that the commission of more than one crime involving moral turpitude, conviction thereof, and imposition of sentence whether or not to run concurrently or consecutively, met the purpose of the deportation statute. And this interpretation is applied in the instant case despite the serious doubts of the minority, concurring opinion that Congress intended the deportation statute to apply to such a case as the instant one.

The Fourth Circuit Court of Appeals, in 1931, confronted the problem in the case of *Tassari v. Schmucker*, 53 F. 2d 570; and after an effort to reconcile the decisions in the *Mignozzi, Pepe* and *Nishimoto* cases, supra, held that the crimes involved must be "separate and distinct", and that the sentence must be "a separate sentence for each offense" to be within the meaning of the statute, whether or not to run concurrently or consecutively.

All of the foregoing, cited cases had been reported when, in 1932, the First Circuit Court of Appeals, in the case of *Clark v. Orabona*, 59 F. 2d 187, held that the shootings of two persons by the defendant, nearly simultaneous, followed by two separate indictments, conviction and two separate sentences, brought him within the deportation statute. But the Court specially pointed out that there "is no evidence that the offenses * * * were not the result of *separate voluntary acts,*" and thus there was compliance with the statute, as there was sentence for "separate offenses." Clearly, had there not been "separate voluntary acts," resulting in "separate offenses" and "separate sentences," the Court's view would have been otherwise. So that it was upon this particular shade or degree of opinion upon which this Court passed in denying the petition for certiorari, 287 U. S. 629.

However, in the following year (1933), the Circuit Court of Appeals for the Fifth Circuit considered the problem in *Wallis v. Tecchio*, 65 F. 2d 250. There, the alien had committed at least four counterfeiting

offenses within a period of several weeks, and had been convicted on an indictment containing four separate counts. The sentence on the first two counts was to a term of imprisonment for two years, on each, the sentences to run consecutively; and on the remaining two counts, for two years, to run concurrently with the first two. The Court held that this did not amount to being "sentenced more than once" for deportation purposes; and, in brief, that a sentencing at the same time for two crimes was not enough—two prosecutions and two separate sentences were necessary, at different times. Note that this decision followed that of the District Court in *Opolich v. Fluckey*, 47 F. 2d 950 (1930) where, after conviction on a four count counterfeiting indictment, there had been a sentence of two years on each count, to run concurrently; the Court holding that there had to be separate sentences more than one time, and that "Congress had in mind what are commonly called 'repeaters', that is to say, persons who commit a crime and are sentenced, and then commit another and are sentenced again."

In 1935, on the authority of *Mignozzi v. Day*, supra, the Circuit Court of Appeals, 2nd Circuit, reversed an order of the District Court in the case of *U. S. ex. rel. Guerricia v. Reimer*, 79 F. 2d 1019, and held against deportation of an alien who had been convicted of the commission of two separate and distinct robberies and one assault with intent to kill, all the victims being different persons, being sentenced to terms of imprisonment of more than one year in each case; the crimes

had all been committed within a period of about two weeks. In a similar case, *U. S. ex. rel. Babac v. Perkins*, D.C.W.D. Pennsylvania, January, 1936 (unreported) a similar result was reached. Likewise, in *U. S. ex rel. LaGrutta v. Hughes*, D.C.D.N.J. 1938, the felon had been charged in separate indictments with, and convicted of, sex offenses committed against different little girls, on at least two distinct and separate occasions; there was a separate sentence on each indictment to a term of imprisonment of from three to five years, the second to run concurrently with the first. The District Court held that this was not "sentenced more than once" under the deportation statute and sustained a writ of habeas corpus; ordering LaGrutta's release.

It must be observed, of course, that in the *Tecchio* and *Guerricia* cases, supra, the Government did not petition the Supreme Court to grant writs of certiorari to the Circuit Courts of Appeal, although the interpretation of the statute reached a result directly contrary to that in the *Orabona* case, supra; and in the *Babac* and *LaGrutta* cases, the Government took no appeals to the Circuit Courts of Appeals—even though the rulings in those cases were at direct odds with that in the *Orabona* case; from which it may be concluded that the then Solicitors-General agreed, then, with the conclusions reached in those cases and did not wish to have those decisions disturbed.

Following the decision in the *Tecchio* case, supra, the Government abandoned any right to file with this Court any petition which would have sought to review

that decision; and a new administrative interpretation of the law, consistent with the ruling in the *Tecchio* case, became the new policy in the administrative decision of all deportation cases falling under the section in question. This policy was to the effect that there must have been at least two separate and distinct crimes committed, two separate and distinct prosecutions therefor and two separate and distinct sentences, at different times, as prerequisites to an order of deportation. Moreover, following the decision in the *Tecchio* case, administrative rulings in some deportation cases held that there must have been service of the term of imprisonment for the first crime before the second crime was committed, or that the second crime must have been committed after sentence for the first, before the condition laid down by the statute could be met. Further, deportation was not ordered where, by a single course of criminal conduct, an alien's offenses were multiplied into numerous counts of an indictment, or different indictments, with separate sentences on counts or indictments at one time.

Such administrative interpretations were followed from about the time of decision of the *Tecchio* case, supra (or about 1933), until about 1944. The administrative interpretation of the statute over so long a period of time, and consistent application of that interpretation to cases arising during that period, is entitled to great weight in determining the meaning of the statute.

THE LEGISLATIVE HISTORY.

The fact of the quite wide divergence of judicial opinion—inherent in the very concurring, minority opinion of the court below in this case—demonstrates that the statute is so ambiguously worded as to warrant reference to the reports of the proceedings in the Congress prior to its passage, as some index of legislative intent. The portion of the section directly in discussion was a provision which was added, as an amendment, to the bill while it was under debate on the floor of the House of Representatives (Cong. Rec. Vol. 53, pp. 5167-5168). Perhaps the principal and most material phase of the debate in this connection is the statement of Representative Burnett, who was in charge of the bill on the floor of the House, and who spoke in favor of the amendment, which had been proposed by Representative Sabath:

> "But the suggestion was then made by the gentleman from Illinois (Mr. Sabath) that those *who committed a second crime* involving moral turpitude showed then *a criminal heart and a criminal tendency,* and they should *then* be deported; and the committee unanimously agreed with the gentleman that that ought to be done. The police commissioner wrote me a letter in which he stated that upon examinations of the prison records he found that there were a great many of those cases, *of men who served out their sentences and then renewed their careers of crime.*" (Italics supplied.)

Speaking of his own amendment, Representative Sabath said:

"My amendment provides that after a *second offense* committed by such an alien, or where he has been for the *second time convicted*, the five year limitation should not apply. In other words, even though he may have been residing in the United States for five years or more, if he is *for the second time convicted* of any offense of or crime involving moral turpitude, he should be deported." (Italics supplied.)

The most cursory analysis of these statements indicates clearly that the Representatives responsible for the introduction of the amendment and the passage of the bill as amended had in mind that the alien who was *a second offender* should be deported—aliens who committed "a second crime" after having committed the first, who were confirmed criminals, who served out the first sentence and then "renewed their careers of crime" and were for "a second time convicted."

Moreover, the Senate adopted the view of the House, for in Report No. 352, 64th Congress, 1st Sess. p. 15, the Senate referred to the proceedings in the House as reported in the Congressional Record (wherein the amendment had been made and the statements of its proponents, interpreting it, had been reported), and referred to the provisions of the amendment as "intended to reach the alien who after entry shows himself to be a criminal of the *confirmed type*, such aliens to be deported without limitation on the length of time after entry when they commit *a second* serious offense." Again is carried through the idea of the commission of a *first* offense, the service

of sentence, freedom and then the *second* offense and punishment, with deportation added to rid the country of the "confirmed" criminal, the "repeater."

Plainly, the judicial interpretations which most nearly square with the Congressional intent, as plainly indicated by the statements, all of the statements made in either House or Senate relative to the section, are those of the District Court in the case of *Opolich v. Fluckey,* supra, and *Wallis v. Tecchio*; and just as truly did the former administrative interpretation, which followed the *Tecchio* case, coincide with the views of those in the Congress responsible for the enactment of the provision in question.

As has been hereinbefore set forth, the decisions of the various circuits are definitely in conflict and those decisions which appear to be opposed to the position of the petitioner are not in accord with the expressed opinions of those legislators who proposed and explained the amendment and its purpose.

The present contention of the petitioner Fong Haw Tan is not the product of artificial reasoning or straining to fit facts to reported decisions. The record shows that he was indicted and tried for the murder of two Chinese. This event occurred on May 22, 1925, in Fresno, California. It is admitted by the petitioner that the killing of two persons at the same time or even at the same instant constitutes separate indictable offenses and just as certainly such action may also present the opportunity of indicting the offender for the separate offenses of possessing and discharging firearms.

The Ninth Circuit Court of Appeals, in its opinion in the instant case states in part as follows: "Tassari vs. Schmucker, 53 Fed. (2) 570, and Clark vs. Orabona, 59 Fed. (2) 187, are in accord with our view." This statement we must respectfully challenge and distinguish, for it contains the implied statement that the cases cited are in accord with the case of your petitioner. An examination of the cases shows otherwise. In the *Tassari* case we find from an examination of the opinion on page 571 that Tassari was sentenced at one time for two separate and distinct crimes, one of which was committed on November 16, 1917, and the other over two months later on January 18, 1918. *Clark v. Orabona* we have already discussed.

Perhaps the Honorable Circuit Court of Appeals feels constrained to follow its own opinion in *Nishimoto v. Nagle* but, in doing so, it merely reiterates its position and does not attempt to resolve the conflict of authority. The best expression of its position may be found in the Court itself where Judge Healy in his concurring opinion says: *"I have serious doubts whether Congress intended the deportation statute to apply to a case like this.* I concur in the affirmance only for the reason that this court in *Nishimoto v. Nagle,* 44 Fed. (2) 304, has already decided the point, and should, until higher authority has spoken, follow that decision."

CONCLUSION.

It is respectfully submitted that a writ of certiorari should be granted and that this Court should review the decision herein of the Circuit Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
September 22, 1947.

LAMBERT O'DONNELL,
WILLIAM J. CHOW,
THOMAS C. LYNCH,
Counsel for Petitioner.